92-243

NO. 92-

Supreme Court, U.S.
FILED
AUG 6 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

JOHN GEORGE BREWER,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

GRANT WOODS
Attorney General of
the State of Arizona

PAUL J. McMURDIE
Chief Counsel
(Counsel of Record)
Criminal Appeals Section
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686

Attorneys for RESPONDENT

QUESTIONS PRESENTED

1. May an attorney who represented a capital defendant in state court petition this Court for a writ of certiorari over the objection of her client?

2. When all of the evidence demonstrates that a capital defendant was capable of waiving his right to a trial, is further review required if the trial court does not couch his findings in the language required under state law?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
REASON WHY THE PETITION SHOULD BE DENIED	1
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
Demosthenes v. Baal 495 U.S. 731 110 S. Ct. 2223 109 L. Ed. 2d 762 (1990)	2
Whitmore v. Arkansas 495 U.S. 149 110 S. Ct. 1717 109 L. Ed. 2d 135 (1990)	1,2,3

REASON WHY THE PETITION SHOULD BE DENIED

A. Brewer objects to the filing of this petition, therefore this Court lacks jurisdiction to entertain the petition.

Ms. Kelly, claiming to be Mr. Brewer's attorney, filed the instant petition. In the petition, Ms. Kelly notes that Mr. Brewer objects to the filing of the petition. (Petition at 4 n.1.) Ms. Kelly's representations are consistent with correspondence received by the Arizona Attorney General's Office from Mr. Brewer. (Appendices A, B, C.) In fact, in Mr. Brewer's letter dated July 29, 1992, Mr. Brewer was unaware that the instant petition had been filed, and asked the Arizona Attorney General what step was necessary to secure a warrant of execution. (Appendix C.)

In Whitmore v. Arkansas, 495 U.S. 149 (1990), this Court held that a criminal defendant must voluntarily request a

petition for certiorari before the Court would grant it. In Demosthenes v. Baal, 495 U.S. 731 (1990), this Court held that a next friend could not file a petition for writ of habeas corpus on behalf of a capital defendant. Because Mr. Brewer has consistently maintained that he wishes to waive all discretionary review and objects to any further review of his sentence and conviction, this Court is without jurisdiction to hear the petition. Whitmore, 110 S. Ct. at 1729.

B. The record adequately supports the Arizona Supreme Court determination that Brewer knowingly, voluntarily, and intelligently waived his right to trial.

Ms. Kelly claims the record does not support the finding that Brewer knowingly, voluntarily, and intelligently waived his right to a jury trial. In Whitmore, this Court noted that it

would not ordinarily disturb the judgment of a state supreme court regarding a finding concerning a defendant's mental ability and voluntariness to waive its trial rights even in a capital case. 110 S. Ct. at 1728. Furthermore, the record below adequately supports the Arizona Supreme Court's determination.

Before accepting Brewer's guilty plea to first-degree murder with no plea agreement limiting the sentence, the trial court conducted a hearing to determine Brewer's competency to change his plea to guilty against the advice of his counsel. At the hearing, defense counsel informed the court that he had reviewed the murder charge and related sentencing issues with defendant and had advised him not to plead guilty. Brewer was then thoroughly questioned by the court regarding his capacity to understand the charges against him, his

rights, and the advice of his attorney. The trial court also asked Brewer if he understood the consequences of waiving his rights and ignoring the advice of counsel, including the irrevocability of a plea that may result in the imposition of the death penalty. At the end of the change of plea hearing, having been satisfied with the defendant's answers throughout the entire proceeding, the trial court stated:

> On the basis of the record I find that the defendant knowingly, intelligently and voluntarily enters into a plea of guilty to the charge of First Degree Premeditated Murder. That there is a factual basis for it.
>
> I find that upon review of the psychological reports [by Michael B. Bayless, Ph.D., and Dean L. Gerstenberger, M.D.], the demeanor of the defendant, his responses to the court's inquiries, his full understanding of consequences of the sentencing options available to the court, and there being only two, Mr. Brewer. Further in light of his education he has versed himself fairly in the legal

> procedures and he does understand the complexities of this case.
>
> Based upon all of the foregoing I hereby accept the plea of guilty.

(Appendix to Petition for Certiorari at 14.)

On mandatory appeal to the Arizona Supreme Court, the state high court noted that Brewer attended 2-1/2 years of college, suffers no learning disabilities, and achieved a full-scale intelligence quotient (I.Q.) of 132, a score that ranks him in the superior range of intellectual functioning. (Appendix to Petition for Certiorari at 16.) The psychiatric reports filed with the trial court found no evidence of mental defect or an erosion of mental capacity and concluded that Brewer was competent to plead guilty. Specifically, Dr. Bayless stated in his report:

> Mr. Brewer is not suffering from any mental disease or defect that would render him incompetent. . . .
>
> . . . .
>
> As stated earlier Mr. Brewer is definitely competent to stand trial and has the ability at this time to understand the nature of the proceedings against him, as well as, the ability to assist his attorney in the preparation of his own defense. Further, if Mr. Brewer chooses to plead guilty, he does have the ability to make a competent decision concerning the waiver of his rights, as well as, a rational and factual understanding of the consequences of entering a plea of guilty in a court of law.

(Appendix to Petition for Certiorari at 16-17.) Dr. Gerstenberger concluded:

> Mr. Brewer is seen to be alert, well oriented, and cooperative. He has no evidence of delusional thinking and is not seen to have any signs of a thought disorder. . . . He understands the charges against him and also is aware of the possible outcome of the legal proceedings against him.
>
> . . . .

> He is competent to change his plea should he decide to do so.

(Appendix to Petition for Certiorari at 17.) The Arizona Supreme Court noted that the course of inquiry at the change of plea hearing only confirmed what the experts reported. Brewer's responses reflected a solid knowledge of the charges and the law, as well as an understanding of his rights and the consequences of waiving his right to trial. (Id. at 17.) Brewer also displayed normal communication skills and thought processes, and the supreme court found the record did not contain a "scintilla of evidence that defendant was coerced into making the plea." (Id. at 17.) Based on the foregoing, the Arizona Supreme Court concluded that the evidence was sufficient to support the trial court's determination that the defendant had the ability to make a

rational choice and to understand the attendant consequences. (Appendix to Petition for Certiorari at 18.) The Arizona Supreme Court rejected all of the other contentions raised by Petitioner in this petition as not being supported by the record. (Id. at 18.)

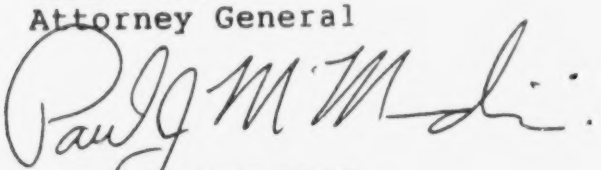
CONCLUSION

Based on the foregoing reasons, the State of Arizona respectfully requests that the petition for certiorari be denied.

DATED this 6th day of August, 1992.

Respectfully submitted,

GRANT WOODS
Attorney General



PAUL J. McMURDIE
Chief Counsel
(Counsel of Record)

Attorneys for RESPONDENT

APPENDICES

APPENDIX A

Mr. Paul J. McMurdie July 16, 1992

c/o Mr. Grant Woods

Attorney General's Office

Department of Law

1275 W. Washington

Phoenix, AZ 85007

RE: State v. Brewer

No. CR-88-0308-AP

Dear Sirs:

On June 10, 1992 I had delivered to your office a letter in which I had outlined an attempt by the Arizona Capital Representation Project [CRP] to involve themselves in this case by having a forced and coerced mental examination performed on me.

It has been a month since that letter, and I have yet to be informed of any action taken by your office on this issue. And though the CRP has retreated somewhat on their demands, they remain an ever present factor and continue to issue threats of action they may take to intervene in this case.

Given that I do not now, nor have I ever had, legal represenattion [sic] that voiced my own views and position, and that I would have no source of legal counsel if/when the CRP does initiate court proceedings, I write now to ask you what courses of action I could and should take to prevent and respond to any action taken by the CRP.

Respectfully yours,

/S/

John George Brewer

P.O. Box B-69227

Arizona State Prison

Florence, AZ 85232

JGB/jr

APPENDIX B

Mr. Paul J. McMurdie
Chief Counsel
Criminal Appeals Section
c/o Mr. Grant Woods
Attorney General's Office
State of Arizona
Department of Law
1275 W. Washington
Phoenix, AZ 85007

July 17, 1992

RE: State v. Brewer
No. CR-88-0308-AP

Dear Sirs:

Once again I must contact you concerning matters that must be brought to your attention. It concerns activities and actions of the Arizona Capital Representation Project [CRP].

I have recently received word that the CRP has contacted someone with whom I write. This person, who I did not know prior to 1989, is totally and completely unrelated and uninvolved in this case. However, without even informing, advising, or giving me notice, representatives of the CRP contacted this person, asked him questions about me, and even sought to acquire copies of the letters that I had written to him.

I do not know under what authority the CRP can intrude themselves into my private and personal life like this since they are not a party to this case- nor have been asked by a party to participate. However, I do ask that steps be made and measures taken to prevent and prohibit any further action by the CRP in this matter.

The trial court has found me competent. Both "mental health experts" have determined that I am competent and able to decide how to direct the course of action in my case (and it is indeed my case and not the CRP's or any other party's.) The Arizona Supreme Court ruled upon my competency and indeed found me to be competent. As the Court stated on page 20 of its opinion in this case:

"... we find sufficient evidence to conclude that [the] defendant's ability to make rational choices and to understand the attendant consequences was not substantially impaired at the time of the guilty plea."
(emphasis added).

My position has not changed since that time, nor have I exhibited any behavior that would call my competency into question.

The CRP is continuing to intrude themselves in this case where they are not wanted. They have attempted to use force and coersion [sic] on me to get me to accede to their wishes. They have ignored my requests and directives that they cease to involve themselves in this matter. And, now, they are making inquiries into my personal and private life by questioning someone unrelated to this case- someone who I did not even know until 1989- and seeking to obtain copies of my private letters.

Based upon the foregoing, and the liklihood [sic] that the CRP will only accelerate its efforts in the future to involve themselves in this case when they are not a party to the proceedings, I ask

that they be banned and prohibited from any and all further activity- until asked to do so.

I thank you for your patience and ask that any breech of form and protocal be overlooked.

Respectfully yours,

/S/

John George Brewer
P.O. Box B-69227
Arizona State Prison
Florence, AZ 85232

JGB/jr

cc: Noel K. Dessaint
Clerk of Courts
Arizona Supreme Court

APPENDIX C

July 29, 1992

Mr. Paul J. McMurdie
Chief Counsel
Criminal Appeal's Section
c/o Attorney General's Office
State of Arizona
Department of Law
1275 W. Washington
Phoenix, AZ 85007

RE: State v. Brewer
No. CR-88-0308-AP

Dear Sirs:

Since I have no legal representation that supports my views, nor acts on my behalf, needs force me to seek out unconventional sources of information in the status and progression of this case. This means that I must rely upon you to keep me advised and up to date on what is the next step in these proceedings and when it will occur.

According to my information, the "Time Limit" for me to file a "Writ of Cert." in this case expired on July 7 (90 days after the reconsideration was denied on April 7). Is this correct? If so, then is not the next step for the Arizona Supreme Court to issue a "Warrant of Execution?" And, if it is indeed the next step, when will the issuance occur?

It most certainly is not my desire to accelerate matters, but I do not wish them to be delayed either. I ask that you advise me of the steps necessary to progress to the next stage in this proceeding so that no undue delay occurs. Thank you.

Respectfully yours

/S/

John George Brewer
PO Box B-69227
Arizona State Prison
Florence AZ 85232